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No. 88-299

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARK A. SMITH, ET AL., PETITIONERS

v.

RONALD REAGAN, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Cases:	Page
Baker v. *Carr*, 369 U.S. 186 (1962)	3, 4
Dames & Moore v. *Regan*, 453 U.S. 654 (1981)	1
Flynn v. *Shultz*, 748 F.2d 1186 (7th Cir. 1984), cert. denied, 474 U.S. 830 (1985)	5-6, 7
Heckler v. *Ringer*, 466 U.S. 602 (1984)	7
Redpath v. *Kissinger*, 415 F. Supp. 566 (N.D. Tex.), aff'd, 545 F.2d 167 (5th Cir. 1976)	5, 6
Thompson v. *Thompson*, No. 86-964 (Jan. 12, 1988)	7
United States v. *Dulles*, 222 F.2d 390 (D.C. Cir. 1954), cert. denied, 348 U.S. 952 (1955)	6
Statutes:	
Hostage Act, 22 U.S.C. 1732	1, 4
28 U.S.C. (& Supp. IV) 1292(b)	4
28 U.S.C. 1361	7
Miscellaneous:	
Cong. Globe, 40th Cong., 2d Sess. (1868)	4-5
H.R. Rep. 99-260, 99th Cong., 1st Sess. (1985)	3

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Petitioners contend that the actions taken by respondents to determine the whereabouts of American servicemen missing in action in the Vietnam conflict do not constitute full compliance with 22 U.S.C. 1732, which is known as the "Hostage Act."[1] They challenge the holdings of the court of appeals that their claims present nonjusticiable political questions and that the Hostage Act does not provide a private right of action.

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[1] Although Section 1732, which was enacted in 1868, is now commonly referred to as the Hostage Act, this appellation is of recent vintage and has no legal significance. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 675 & n.7 (1981). "Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad, and repatriating such citizens against their will" (*id.* at 676).

1. a. In January 1973, the United States entered into an agreement to end the military conflict in Vietnam. This agreement, generally known as the Paris Accords, provided for the return of those held captive by all parties to the conflict and for a full accounting of those missing in action. Although several hundred Americans were repatriated as a result of the Paris Accords, no accounting was made for approximately 2,500 Americans who were missing in action. Pet. App. 55-56.

Since the withdrawal of American forces from South Vietnam, the Defense Intelligence Agency (DIA), an agency within the Department of Defense, has played the primary role in gathering intelligence information on the existence and physical whereabouts of unaccounted for Americans in Southeast Asia. Since 1980 these efforts and related policy matters have been coordinated by an interagency task force comprised of representatives of the State and Defense Departments, the White House National Security Council, and the Joint Chiefs of Staff, as well as staff members of the House Foreign Affairs Committee and the Senate Foreign Relations Committee and a representative of the National League of POW/MIA Families. In addition to their participation in the interagency task force, both Houses of Congress have exercised continuous oversight of efforts on behalf of MIAs through their respective Subcommittees on Asian and Pacific Affairs. Pet. App. 57-58.

The House has also formed its own bipartisan Task Force on POW/MIAs. In 1984, this Task Force investigated charges of a cover-up of information regarding live prisoners in Southeast Asia. It concluded that there was no government cover-up, a conclusion that was later approved by the House Permanent Select Committee on Intelligence. After reviewing the work performed by the Subcommittee on Asian and Pacific Affairs, the Task Force, and the DIA, the Select Committee on Intelligence

concluded that "both the Task Force and the Subcommittee conduct careful and adequate oversight of POW/MIA matters," and that "DIA performs unbiased, professional, and thorough analyses of POW/MIA live sighting cases." H.R. Rep. 99-260, 99th Cong., 1st Sess. 4 (1985).

b. Petitioners, who are the next of kin of four American servicemen missing in action in Southeast Asia, brought this suit on behalf of a proposed class of "all living American Prisoners of the [Vietnam War] currently being held in captivity" by foreign governments (Pet. App. 59). Petitioners sought a writ of mandamus to compel the President to pursue further official inquiries about the existence and status of Americans missing in action and a declaration that the plaintiff class exists and enjoys the protection of the Hostage Act (*id.* at 21, 60).

Respondents moved to dismiss on the grounds that petitioners' claims present nonjusticiable political questions, that no private right of action may be implied under the Hostage Act, and that plaintiffs had failed to state a claim upon which mandamus or declaratory relief could properly be granted. The district court granted the motion to dismiss with respect to petitioners' claim for mandamus relief, holding that this claim "directly involves foreign policy decisions and falls squarely under the category of political questions outlined in [*Baker* v. *Carr*, 369 U.S. 186 (1962)] which involve 'potential judicial interference with executive discretion in the foreign affairs field' and which 'seek to dictate foreign policy' " (Pet. App. 25 (citation omitted)). The court denied the motion to dismiss with respect to the claim for declaratory relief, however, holding that the resolution of questions as to the existence and status of Americans missing in action involved only questions of fact (*id.* at 30-31).

c. After the district court certified the case for interlocutory appeal pursuant to 28 U.S.C. (& Supp. IV) 1292(b) (Pet. App. 52), the court of appeals reversed and remanded with instructions to dismiss the case in its entirety (*id.* at 53-82). The court held that the claim for declaratory relief fell squarely within the scope of the political question doctrine and was accordingly nonjusticiable. By that claim, the court stated, petitioners asked the court "to determine whether American service personnel remain in captivity in southeast Asia and to assess the adequacy of the executive's efforts to secure the release of any who do" (*id.* at 61-62). The court concluded that such a request "presents a textbook example" of the sort of claim that is barred by the political question doctrine, as there is "a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' and 'a lack of judicially discoverable and manageable standards for resolving it' " (*id.* at 63-64) (quoting *Baker* v. *Carr*, 369 U.S. at 217)).

The court further held that it would not infer a private right of action under the Hostage Act. The court noted that the language of the Act (which is *reprinted in* Pet. App. 85-86) provides no private rights, but instead requires the President to report to Congress "as soon as practicable" as to the efforts taken on behalf of "any citizen of the United States [known to have] been unjustly deprived of his liberty by or under the authority of any foreign government." Moreover, the court added, the Congress that passed Section 1732 believed that any remedy for its violation was in the hands of the electorate. As one Senator stated, "we can do nothing but declare the principle; and if the Government does not do its duty the people will remedy it, and we must leave the proper remedy to those who have it in their hands." Cong. Globe,

40th Cong., 2d Sess. 4358 (1868) (statement of Sen. Fessenden) (quoted at Pet. App. 78). Furthermore, the court stated, the Hostage Act was enacted "long before the practice of finding implied private rights of action became common," so that Congress's "failure to provide explicitly for a private right of action is powerful evidence of its intent not to provide one at all" (Pet. App. 79).

The Fourth Circuit denied petitioners' petition for rehearing with suggestion for rehearing en banc, with no judge dissenting (Pet. App. 83-84).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, further review is not warranted.

a. Petitioners primarily argue (Pet. 14-16) that review is warranted because the court of appeals' holding that their claims are barred by the political question doctrine conflicts with the decisions in *Flynn* v. *Shultz*, 748 F.2d 1186, 1195 (7th Cir. 1984), cert. denied, 474 U.S. 830 (1985), and *Redpath* v. *Kissinger*, 415 F. Supp. 566 (N.D. Tex.), aff'd, 545 F.2d 167 (5th Cir. 1976) (Table). This assertion is incorrect.

In *Flynn*, the court held that it could *not* review the question whether the President had taken "necessary and proper" steps to obtain the release of an American citizen incarcerated in Mexico. The court reasoned that ordering the President to take a particular action to obtain the release of an American citizen held in a foreign country "would impermissibly interfere with the Executive's discretion to conduct foreign affairs and would, consequently, be inconsistent with the political question doctrine" (748 F.2d at 1195). The court similarly held that it was precluded from declaring that the citizen's detention abroad was unjust or in violation of American citizenship (*id.* at

1193-1195). The court in *Flynn* did find that it could consider whether the President had "inquire[d] into the circumstances of [the] American citizen's extended detention abroad" (*id.* at 1195), although it concluded that "[i]n light of the deferential standard of review required in cases touching on foreign affairs, the Executive has already fulfilled any duty of inquiry and report under the Hostage Act" (*id.* at 1197). The duty found reviewable in *Flynn* has no counterpart in the present case, however, because there is no allegation here that the President has failed to look into allegations that servicemen remain captive in southeast Asia, and there is no question that any such captivity would be unlawful (Pet. App. 68).

Similarly, in *Redpath*, the plaintiff also sought to compel Executive Branch action to free an American citizen from detention in Mexico. The court held that "[t]here is no doubt that a District Court has no authority to grant the requested relief by Writ of Mandamus or otherwise" (415 F. Supp. at 567). This holding was based on the court's view that " 'commencement of diplomatic negotiations with a foreign power is completely in the discretion of the President * * *. The Executive is not subject to judicial control or direction in such matters.' " *Id.* at 568 (quoting *United States* v. *Dulles*, 222 F.2d 390, 394 (D.C. Cir. 1954), cert. denied, 348 U.S. 952 (1955)).

Thus, the cases petitioners rely upon do not conflict with the decision below. To the contrary, they support the conclusion that adjudication of petitioners' claims would invoive the court in an unmanageable and standardless inquiry that would inevitably intrude into the heart of the Executive's ability to conduct foreign policy. Accordingly, the court below properly concluded, consistent with the decisions of other courts to consider the issue, that petitioner's claims are not justiciable.

b. Petitioners also challenge the court of appeals' alternative holding that the Hostage Act does not provide a private right of action. Petitioners' assertion (Pet. 16-18) that this holding conflicts with the decisions of other courts is incorrect, since the courts in *Flynn* and *Redpath* did not address the issue whether the Hostage Act created a private right of action.[2] Moreover, the analysis of the court of appeals is fully consistent with this Court's repeated admonitions that, in determining whether a private right of action is to be inferred, the " 'focal point' " of the judicial inquiry must be congressional intent. Pet. App. 76 (quoting *Thompson* v. *Thompson*, No. 86-964 (Jan. 12, 1988), slip op. 4). As the court of appeals observed, the language, legislative history, and contemporary context of the Hostage Act all support the conclu-

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[2] As noted above, the court in *Flynn* did find (748 F.2d at 1195) that it could review the question whether the Executive had inquired into the circumstances of an American citizen's detention abroad, an issue not presented here. However, that court did not expressly consider whether Congress had intended to create a right of action under the Hostage Act. It merely noted its conclusion that the Act created a judicially reviewable duty, and then went on to find that the Executive had fulfilled the duty. It is possible, given that the terms of the Act explicitly require the President to inquire into the reasons for the imprisonment of an American abroad once it has been made known that an American citizen has been detained by a foreign country, that the court was reviewing the Executive's action under the mandamus statute (28 U.S.C. 1361). We note that the Hostage Act does *not* require the President to determine whether any Americans are being held in captivity abroad, so whether the Executive has done so is not reviewable by way of mandamus, which provides for relief "only if the defendant owes [the plaintiff] a clear nondiscretionary duty." *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984). Furthermore, as noted, there is no dispute that the Executive *has* attempted to determine whether any Americans are being held hostage in southeast Asia; petitioners seek review only of the adequacy of that effort.

sion that Congress did not intend to permit private enforcement of the Act (Pet. App. 77-80).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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